STATE OF MICHIGAN
IN THE SUPREME COURT

JOSEPH G. NICKOLA, Personal Representative of the Estates of GEORGE NICKOLA, deceased and THELMA NICKOLA, deceased,

Plaintiffs-Appellants,

vs.

MIC GENERAL INSURANCE CORPORATION,

Defendant-Appellee.

Supreme Court No:
Court of Appeals No: 322565
Lower Case No: 05-81192-NI
(Genesee County Circuit Ct.)

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PLAINTIFFS' APPLICATION FOR LEAVE TO APPEAL

EXHIBITS

CERTIFICATE OF SERVICE

STATEMENT REGARDING JURISDICTION

Plaintiffs filed this action in Genesee County Circuit Court seeking recovery of underinsured motorist ("UIM") benefits payable under their insurance contract with Defendant MIC General. By Order of March 6, 2006 (Ex. 2), Hon Richard B. Yuille, Circuit Court Judge, ordered the case into arbitration, retaining jurisdiction to enforce compliance with the arbitration award and adjudicate any other issues.

Following arbitration, on June 19, 2014, Judge Yuille issued an Order which confirmed the arbitration awards (Ex. 3). That Order denied Plaintiff's motion for costs and attorney fees and for entry of a judgment (Id.). Within 21 days of that Order, Plaintiffs filed their Claim of Appeal to the Court of Appeals on July 7, 2014.

On September 24, 2015, the Court of Appeals issued its published Opinion (Ex. 1). In pertinent part, the Opinion affirmed the denial of interest under the Uniform Trade Practices Act, and for costs and attorney fees under MCR 2.114. Plaintiffs now seek Supreme Court review under MCR 7.301(A)(2) (""the Supreme Court may review by appeal a case... after decision by the Court of Appeals"). The Application is filed within the 42 day period of MCR 7.302(C)(2)(b).

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Plaintiffs-Appellants answer "YES".

II. SHOULD LEAVE TO APPEAL BE GRANTED TO REVIEW THE LOWER COURTS' RULING THAT THE INSURER'S ANSWER, REFUSING TO ADMIT THAT ITS INSURANCE POLICY ALLOWED PLAINTIFFS TO REQUEST ARBITRATION, WAS NOT SANCTIONABLE UNDER MCR 2.114?

Plaintiffs-Appellants answer "YES".

CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Introduction

The Uniform Trade Practices Act, MCL 500.2001 et. seq. ("UTPA"), requires insurers to promptly pay insurance benefits, and assesses interest when they fail to do so, MCL 500.2006(1), (3), (4). Under the statute, the insurer may avoid the interest obligation when the claimant is a third party and the liability is "reasonably in dispute", MCL 500.2006(4). Where the claimant is the insured, the statute contains no "reasonably in dispute" exception to the insurer's interest obligation, MCL 500.2006(4); Griswold Properties, LLC v Lexington Ins Co, 276 Mich App 551, 565-266; 741 NW2d 549 (2007); No-Limit Clothing Inc v Allstate Ins Co, 2011 U.S. Dist. LEXIS 2875 (ED Mich, 2011) (Ex. 26).

In this case, the Court of Appeals created a judge-made "reasonably in dispute" exception where the insured purchases underinsured motorist coverage ("UIM") (Opinion, pp. 5-8). With this ruling, Defendant was relieved of any obligation to pay UTPA interest on its UIM liability, arising in 2004, for which it has still paid nothing, despite an arbitration award on October 2, 2013. And, the Court of Appeals relieved the insurer of any responsibility under MCR 2.114 for refusing to acknowledge the existence of its own policy's arbitration clause, requiring Plaintiffs to bring suit. The following are the background facts which shape the issues for which Plaintiffs seek Supreme Court review.

Plaintiffs' Injuries And Claims For Underinsured Motorist Benefits Under The Insurance Policy Purchased From Defendant

On April 13, 2004, George Nickola and his wife, Thelma Nickola,[1] were injured when their car was struck by one driven by Roy Smith, whose tort liability was insured by Progressive. The Nickolas purchased their first party insurance, including Underinsured Motorist coverage, from Defendant MIC General (also referred to as GMAC Insurance). Smith's Progressive liability insurance had policy limits of $20,000 per person / $40,000 per incident (Ex. 4). The UIM coverage which Mr. and Mrs. Nickola purchased from MIC General provided supplemental benefits of up to $80,000 each [the $100,000 UIM policy limits less the $20,000 limits of Smith's liability insurance with Progressive] (Ex. 5).

Within one month of the collision, on May 7, 2004, Plaintiffs' counsel submitted a claim for UIM benefits (Ex. 6). By letter of July 9, 2004 (Ex. 7), counsel for the Nickolas notified MIC General (GMAC) of the severity of the injuries:

> "George Nickola:
>
> > He had a broken fibula in the lower left leg, both ankles were severely sprained and bruised and his heels were damaged. George Nickola also sustained head injuries and a severely sprained right wrist. He had numerous abrasions and contusions upon his body. He was in the hospital for over three (3) weeks and upon discharge he was still not able to urinate. That problem was caused as a result of the trauma, however, it is my understanding that he had a pre-existing prostate problem. George required attendant services for a long period of time and even continues to need assistance.
>
> Thelma Nickola:

[1] Although they have since passed away, this Brief uses the plural term "Plaintiffs" in referring to Mr. and Mrs. Nickola.

> Her injuries included but were not limited to a comminuted fractured knee-cap, numerous bruises and contusions on her head, ear, face, belly, both legs, her hips and her arms. She also had two head injuries sustaining a large bump on her forehead as well as a large bump to the top of her head. Thelma also needed attendant care for an extended period of time.
>
> After George and Thelma were discharged from the hospital, your records should show that they were unable to live by themselves and had to move in with their daughter, Tina Bowles. Her home had to be modified so that she could care for her parents."

Plaintiffs' counsel also granted the UIM adjustor access to the medical records received by Defendant in its role as no-fault insurer of Plaintiffs' medical expenses (Ex. 7, Ex. 8). Plaintiffs requested that MIC General authorize settlement of the tort claims against Smith for the Progressive policy limits, and requested payment of the MIC policy limits ($80,000) of UIM coverage (Ex. 9).

MIC General authorized settlement with Smith (Ex. 10). However, it rejected Plaintiffs' repeated request for UIM benefits (Ex. 11), claiming that, "your client's [sic] were adequately compensated" by the recovery of $20,000 each from Smith's insurance (Ex. 12).

Refusing To Acknowledge The Content Of Its Own Insurance Policy, Defendant Requires Plaintiff To File Suit To Obtain Arbitration

The UIM insurance policy (Ex. 5) contained an "ARBITRATION" provision (Ex. 5, p. 5). If the insurer and insured could not agree, "[e]ither party may make a written

demand for arbitration" (Id.). Accordingly, by letter of February 22, 2005 (Ex. 13), Plaintiffs requested arbitration of their UIM claims.

Despite the language of the UIM "ARBITRATION" provision (Ex. 5, p. 5), MIC General refused to arbitrate, contending that the claim could only be arbitrated if both parties agreed (Exhibit E to Complaint). As a result, Plaintiffs were required to file this action, on April 8, 2005, seeking an order to arbitrate and for damages in the amount of the UIM benefits, and for the Court to retain jurisdiction (Ex. 14, docket entries). Defendant filed its Answer, claiming not to know whether its insurance policy required it to arbitrate on Plaintiffs' request (Ex. 15).

This denial precipitated almost one year of litigation. Eventually, on February 1, 2006, Plaintiffs filed their Motion (Ex. 16). As here pertinent, that Motion sought attorney fee sanctions under MCR 2.114 (Ex. 16, ¶¶ 14-21). In essence, Plaintiffs contended that Defendant had no basis in fact for its false denials. Additionally, the Motion sought an Order for UIM benefits, and to arbitrate, and any other appropriate relief (Ex. 15, pp. 5-6).

The Initial Circuit Court Order

Argument on the motion was held on February 14, 2006 (Ex. 17). Defense counsel finally admitted, as the policy language provided, that Defendant was required to arbitrate upon Plaintiffs' request (Tr. 2/14/06, pp. 12-15). The Court suggested sending the case to arbitration, "leaving this part [Rule 2.114 sanctions] with me" (Id., p. 18), because "I need to look at [it] at some point in time" (Id., p. 17). In the meantime, the

Court asked for Plaintiffs' counsel to itemize the expense and time spent to date, "I just want to see his time frame in terms of his costs and expenses" (Id.).

As an outgrowth of this ruling, an Order was entered on March 6, 2006 (Ex. 2). The Order required Plaintiffs' counsel to provide the Court and defense counsel with itemized costs and attorney fees and the case was ordered into arbitration, and:

> "...[T]his Court retains jurisdiction to enforce compliance and/or make any other determination, orders and/or judgments necessary to fully adjudicate the rights of the Parties herein."

The Belated Arbitration Award

For the next six years, the court-ordered arbitration never proceeded, as the attorneys and arbitrators could not agree on a neutral. As a result, Plaintiffs were required to return to Circuit Court to file a motion, seeking appointment of a neutral arbitrator by the Court. Following oral argument (Ex. 18), Judge Yuille appointed a neutral arbitrator.

Ultimately, the arbitrators issued their Arbitration Award in October of 2013 (Ex. 19). The Award provided the full $80,000 UIM policy limits on the claim of George Nickola, and $33,000 on the claim of Thelma. These awards were, "inclusive of interest, if any, as an element of damages from the date of injury to the date of suit, but not inclusive of other interest, fees or costs that may otherwise be allowable by the Court" (Ex. 19). In the 9 ½ years between the motor vehicle accident and Arbitration Award, both George and Thelma Nickola passed away and were replaced as Plaintiffs by their son and Personal Representative, Joseph Nickola.

The Next Round Of Litigation

Since Defendant had failed to pay the Arbitration Award, on November 25, 2013, Plaintiffs were required to seek circuit court relief that had been reserved in the March 6, 2006 Order (Ex. 2). Their Motion (Ex. 20, with some lettered exhibits attached) requested entry of a judgment on the Arbitration Award (Ex. 20, p. 19), the attorney fee sanctions which remained unresolved (Id.), 12% interest under the Uniform Trade Practices Act, MCL 500.2006 (Id.), and "all [other] applicable interest thereon" (Id.). Defendant later filed its Response (Ex. 21).

This Motion was argued on December 9, 2013 (Ex. 22). Six months later, on June 19, 2014, Judge Yuille issued his order (Ex. 3). While ruling that, "The arbitration awards are affirmed" (Ex. 3, p. 2), the Court "DENIED" Plaintiffs' motion seeking entry of a Judgment, attorney fees, and interest.

Plaintiffs' request for penalty interest under the Uniform Trade Practices Act ("UTPA"), MCL 500.2001, et. seq., was denied because, in the Court's view, MCL 500.2006 was inconsistent with the No-Fault Act. Without citing any evidence or other basis for so ruling, the Court opined that, "the underinsured motorist claims were reasonably in dispute" (Ex. 3, p. 1). In further support, Judge Yuille found that the "issue should have been heard by the arbitrator [sic]", without addressing the arbitrators' decision that the matter was for the Court. The Court did not otherwise address the issues of Rule 2.114, attorney fee sanctions or statutory interest under MCL 600.6013. Nor did the Court explain why he would not enter a Judgment, without which Defendant has still

not satisfied the Arbitration Award and Plaintiffs are left without a circuit court judgment to serve as a basis for collection proceedings.

The Court Of Appeals Decision

On September 24, 2015, the Court of Appeals (Judges Gadola, Jansen, and Beckering) issued its published per curiam Opinion (Ex. 1). It upheld the denial of Rule 2.114 sanctions for Defendant's pleading which would not admit that the insurance policy it sold allowed Plaintiff to seek arbitration (Ex. 1, pp. 4-5). In the view of the intermediate appellate court, Plaintiffs "waived" the claim of relief by not submitting evidence of costs and attorney fees before Judge Yuille decided whether sanctions were recoverable (Ex. 1, pp. 4-5).

As to UTPA interest, the Court of Appeals recognized that, under Griswold Properties, LLC v Lexington Ins Co, 276 Mich App 551; 741 MW 2d 549 (2007) and the language of MCL 500.2006(4), "if the claimant is the insured... and benefits are not paid on a timely basis, the claimant is entitled to 12% interest, irrespective of whether the claim is reasonably in dispute" (Ex. 1, p. 6). The Court then acknowledged, "At first glance, plaintiff's argument – that he is entitled to penalty interest because he sought benefits that were owed directly to an insured by an insurer and that the 'reasonably in dispute' language of §2006(4) does not apply – has some appeal in light of Griswold."

The Court nonetheless held that a "reasonably in dispute" limitation should be read into the statute for UIM claims because they resemble tort claims by a third party against the insured (Ex. 1, pp. 6-8). The Court found that the claims were "reasonably in dispute", because the insurer could reasonably dispute that the damages sustained by Mr.

and Mrs. Nickola exceeded the $20,000 policy limits paid by Smith's insurer (Ex. 1, p. 8). Although the Court ordered the trial judge to enter judgment for Plaintiffs (Ex. 1, pp. 9-10), it did not explain why the UTPA provided no remedy for the insurer's continued failure to pay even after the Arbitration Award.

ARGUMENT

I. LEAVE TO APPEAL SHOULD BE GRANTED TO REVIEW THE APPELLATE COURT'S INTERPRETATION OF THE UNIFORM TRADE PRACTICES ACT AS ALLOWING AN INSURER TO AVOID ITS INTEREST OBLIGATION TO ITS OWN INSURED FOR UNDERINSURED MOTORIST BENEFITS BY A "REASONABLY IN DISPUTE" LIMITATION THAT THE LEGISLATURE CONSCIOUSLY OMITTED FROM THE STATUTE FOR CLAIMS BY THE INSURER'S OWN INSURED

In addition to "reasonably in dispute", the trial court claimed that the UTPA was to be disregarded because it was inconsistent with the No-Fault Act, thus inapplicable under MCL 500.2006(6). The trial judge was unable to identify any "specific inconsistency" between MCL 500.2006(4) and the No-Fault Act. This is hardly surprising. Uninsured motorist and UIM benefits are not required by the No-Fault Act. They are a separate form of benefits which are strictly contractual in nature, and are outside the scope of the No-Fault Act. Rory v Continental Ins Co, 473 Mich 457, 465; 703 NW 2d 23 (2005) ("uninsured motorist coverage is optional – it is not compulsory coverage mandated by the no-fault act"); Twichel v MIC General, 469 Mich 524, 533; 676 NW 2d 616 (2004) ("Uninsured motorist benefit clauses are construed without reference to the no-fault act because such insurance is not required under the act"); Cole v Auto Owners, 272 Mich App 50, 54; 723 NW 2d 22 (2006). And, the UTPA itself plainly applies to fire insurance, property insurance, homeowners insurance, and other voluntary insurance coverages like UIM.

The trial court also denied Plaintiffs relief on the basis that UTPA interest was an issue for the arbitrators, not the Court. That "reason" is non-sensical, as his own earlier Order reserved jurisdiction to decide such matters (Ex. 2), and the arbitrators honored that ruling by leaving the issue of interest to the Court.

Quite correctly, the Court of Appeals could not uphold the decision below on either of these grounds. This Brief therefore focuses on the "reasonably in dispute" rationale on which the question of UTPA interest turns.

A. Standard of Review

The Application calls upon the Court to decide the meaning and applicability of the Uniform Trade Practices Act, an enactment of the Michigan Legislature designed to require prompt payment of insurance benefits. The meaning and application of statutes such as MCL 500.2006 are issues of law reviewed de novo. Shinholster v Annapolis Hospital, 471 Mich 540, 584; 685 NW 2d 275 (2004); Liss v Lewiston Richards, Inc, 478 Mich 203, 207; 732 NW 2d 514 (2007); Independent Bank v Hammell Associates, LLC, 301 Mich App 502, 509; 836 NW 2d 787 (2013).

As this court has often stressed, when the language of a statute is clear, principles of judicial restraint and separation of powers call upon a court, even this Supreme Court, to construe and apply the language as written. Gardner v Dept of Treasury, 498 Mich 1; 869 NW 2d 199 (2015); Fairley v Dept of Corrections, 497 Mich 290; _____ NW 2d _____ (2015); Sun Valley Foods v Ward, 460 Mich 230, 236; 596 NW 2d 119 (1999).

The Court may not second guess the wisdom of the Legislature in employing that language. Alexander v MESC, 4 Mich App 378, 383; 144 NW 2d 850 (1966); Wojewoda v MESC, 357 Mich 374, 379; 98 NW 2d 590 (1959). Nor may the Court create judge-made limitations or exceptions which the Legislature did not see fit to enact. Alexander, supra; Ford Motor Co v Unemployment Compensation Commission, 316 Mich 468, 473; 25 NW 2d 586 (1947) ("The court is not at liberty to read into the statute provisions which the legislature did not see fit to incorporate").

B. Summary of the Uniform Trade Practices Act

The Uniform Trade Practices Act ("UTPA") is an integral part of the Insurance Code. MCL 500.2006(1) characterizes the "[f]ailure to pay claims on a timely basis" as an "unfair trade practice". Sub-section (3) identifies a separate unfair trade practice. If it deems the insured's proof of loss inadequate, "An insurer shall specify in writing the materials that constitute a satisfactory proof of loss" within 30 days of receipt of the claim. For non-compliance, MCL 500.2006(4) enacts a legislative interest penalty where, as here, the claimant is the insured:

> "If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance." (emphasis added).

Only where the claimant is a third party is an enhanced showing, including "not reasonably in dispute", required for penalty interest to apply [MCL 500.2006(4)]:

> "If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory

> proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law." (emphasis added).

The language of MCL 500.2006(4) is conspicuous in providing "reasonably in dispute" as a defense: only if, "the claimant is a third party tort claimant". No such ground for avoiding interest exists "if the claimant is the insured". Beyond serious dispute, the Legislature has limited the applicability of "reasonably in dispute". It has based that limitation on the status of the claimant, "if the claimant is the insured", and has not made the type of insurance a criterion.

The 12% interest assessed under the UTPA is designed to incentivize insurers to pay meritorious claims in a timely fashion. See Sharpe v DAIIE, 126 Mich App 144, 149-150; 337 NW 2d 12 (1983); Siller v Employees of Wausau, 123 Mich App 140, 143-144; 333 NW 2d 197 (1983); Fletcher v Aetna Casualty Co, 80 Mich App 439, 445; 264 NW 2d 19 (1973).

C. Whether A Claim Is "Reasonably in Dispute" Is Not Relevant To The Analysis When The Claimant Is The Insurance Company's Own Insured

It is commonly accepted that an insurance company owes duties to its own insured, different than, and greater than, those owed to adverse third party claimants. In settlement negotiations, for example, an insurer may be reluctant to offer a settlement to a third party claimant, for fear that it will be charged with abdicating its duty to defend the insured. Or, if it exercises the commonly retained insurer prerogative to make settlement

decisions, the insurance company might be faulted by the insured, who sought vindication at trial.

Consistent with the separate duties owed by an insurer, the UTPA adopts two separate standards for interest liability. The first sentence of MCL 500.2006(4) is critical: "if the claimant is the insured...", interest assessment depends on a single criterion, "If the benefits are not paid on a timely basis". Whether or not the claim is in dispute has nothing to do with the single issue presented when the claimant is the insured [or certain others claiming through the insured]: whether the benefits were paid on a timely basis, as that phrase is used in the UTPA.

The "reasonably in dispute" standard invoked by Judge Yuille and the Court of Appeals appears nowhere in the first sentence of MCL 500.2006(4). Rather, that term is found in the second sentence, which begins, "If the claimant is a third party tort claimant...". Plaintiffs are not "a third party tort claimant", to whom "reasonably in dispute" erects an interest hurdle. Rather, they are "the insured" whose UTPA interest claim is governed by the first sentence and its single requirement: the benefits were not paid on a timely basis.

As Plaintiffs' counsel advised the trial court (Tr. 12/9/13, pp. 13-14, 25-26, Ex. 22), the meaning of these two sentences was firmly established by the special conflict panel in Griswold Properties, LLC v Lexington Insurance Company, 276 Mich App 551, 565-566; 741 NW 2d 549 (2007):

> "The first sentence concerns first party insureds, and provides that a first-party insured is entitled to interest if benefits are not paid within 60 days after satisfactory proof of loss is

> provided. This sentence does not specify that a first-party insured is entitles to interest only if the liability of the insurer is not 'reasonably in dispute.' The 'reasonably in dispute' language is found only in the second sentence, which expressly applies to third-party tort claimants. As the Griswold Court stated, '[t]his Court must assume that the omission of the requirement [that the liability of the insurer be 'reasonably in dispute'] in the first sentence was intentional.' Griswold, supra at 549. The first sentence of MCL 500.2006(4) speaks specifically to claims filed by first-party insureds, and the Legislature's omission of the 'reasonably in dispute' language from that sentence must be construed as intentional. Pellegrom, supra at 103. Therefore, we decline to read 'reasonably in dispute' language into the first sentence of MCL 500.2006(4). Further, we will not speculate that the Legislature probably intended that the language apply to first-party insureds, notwithstanding its absence from the first sentence. Twentieth Century Fox, supra at 545.
>
> * * *
>
> Because of our analysis of the penalty interest provision in the UTPA, we adopt the conclusion of the Griswold Court as our own. Thus, we 'follow the reasoning in Yaldo and find that the 'reasonably in dispute" language of MCL 500.2006(4) applies only to third-party tort claimants; if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance, and benefits are not paid on a timely basis, the claimant is entitled to 12 percent interest, irrespective of whether the claim is reasonably in dispute.' Griswold, supra at 551" (emphasis added).

Accord: McNeel v Farm Bureau, 289 Mich App 76; 795 NW 2d 205 (2010).

The same conclusion was reached by Judge Cook of the federal District Court for the Eastern District of Michigan. In No-Limit Clothing Inc v Allstate Ins Co, 2011U.S. Dist. LEXIS 2875 (Ex. 26) he ruled (p. 9):

> "Although the insurer's bad faith is a prerequisite for the applicability of the penalty interest when the payment is to be made to a third-party tort claimant, No-Limit is the insured – not a third-party claimant. See *Hawthorne v Lincoln Gen. Ins. Co.*, No. 08-12325 WL 1035293, at 2 (E.D. Mich. Apr. 16, 2009) (to be entitled to 12% penalty interest, third-party tort claimants, unlike insureds or other parties directly entitled to benefits under an insurance contract, must demonstrate that the claim was not reasonably in dispute and the insurer refused payment in bad faith). Therefore, the entitlement of No-Limit to receive the 12% penalty interest hinges on whether – and if so, when – the claim was submitted to Allstate along with satisfactory proof of its losses. If No-Limit can demonstrate that Allstate failed to make the payment within a sixty-day period of such submission, it could claim entitlement to the penalty interest regardless of Allstate's good or bad faith" (footnote omitted).

In short, the "reasonably in dispute" hurdle invoked by the lower courts is no hurdle at all to recovery of interest by the insureds. The Court of Appeals erred in rejecting Plaintiffs' claim for UTPA interest on this basis.

D. Plaintiffs Established The Criterion of MCL 500.2006(4) Applicable To A Claim By The Insured: Failure To Pay Benefits In A Timely Fashion

MCL 500.2006(3) specifies when there is or is not timely payment:

> "An insurer shall specify in writing the materials that constitute satisfactory proof of loss not later than 30 days after receipt of a claim unless the claim is settled within the 30 days. If proof of loss is not supplied as to the entire claim, the amount supported by proof of loss shall be considered paid on a timely basis if paid with 60 days after receipt of proof of loss by the insurer. Any part of the remainder of the claim that is later supported by proof of loss shall be considered paid on a timely basis if paid within 60 days after receipt of proof of loss by the insurer. If the proof of loss provided by the claimant contains facts that clearly indicate

> the need for additional medical information by the insurer in order to determine its liability under a policy of life insurance, the claim shall be considered paid on a timely basis if paid with 60 days after receipt of necessary medical information by the insurer. Payment of a claim shall not be untimely during which the insurer is unable to pay the claim when there is no recipient who is legally able to give a valid release for the payment, or where the insurer is unable to determine who is entitled to receive the payment, if the insurer has promptly notified the claimant of that inability and has offered in good faith to promptly pay the claim upon determination of who is entitled to receive the payment."

To summarize the procedure, first the insurer must specify the materials needed as "satisfactory proof" of the claim. Then, the insured is to provide the materials requested. If it needs additional medical information, the insurer is to notify the insured who, in turn, is to provide the additional medical information requested.

Here, Plaintiffs submitted their claim on May 7, 2004 (Ex. 6). Defendant never took issue with the sufficiency of this submission. Nor did it take the initial step demanded by the Legislature: specifying any materials required for a "satisfactory proof of loss". After the claim (Ex. 6) was submitted, Defendant never identified any shortcoming. Defendant never objected, timely or otherwise, to the sufficiency of Plaintiff's proof of loss. Accordingly, it is now established, as a matter of law, that Plaintiffs' submission of May 7, 2004 (Ex. 6) constitutes an adequate proof of loss. Angott v Chubb Group Ins Co, 270 Mich App 465, 485-486; 717 NW 2d 341 (2006). This triggered the obligation to pay within 60 days, MCL 500.2006(3). For failure to do so, MIC General became liable for 12% interest from July 6, 2004 (60 days after the claim) to payment.

E. Leave To Appeal Should Be Granted To Review The Appellate Court's Creation Of A "Reasonably In Dispute" Exception For Underinsured Motorist Insurance

In creating a "reasonably in dispute" exception to the interest obligation to insureds, the Court of Appeals has offended the principles of statutory construction which forbid judge-made exceptions not moored in the Legislature's language. Ford Motor Co, supra; Alexander, supra. In this respect, the decision is clearly erroneous and causes Plaintiffs substantial harm.

The decision below is inconsistent with the statute in another, related, respect. The structure of MCL 500.2006(4) reflects a conscious legislative decision to make "reasonably in dispute" a criterion for only the claims of third parties. That is not a criterion "if the claimant is the insured". Plaintiffs are indisputably in that category. Nothing whatsoever in the language limits the reach to some forms of insurance, but not others. The appellate court's effort to sub-divide the class of "insureds" by specific coverages, often (as here) provided in the same insurance policy, cannot be squared with the breadth of the UTPA, which applies to insurance coverages across the board.

The decision of the Court of Appeals, spoken most favorably of, seems grounded in the notion that UIM insurance involves a greater measure of uncertainty; e.g unliquidated damages, a no-fault threshold, and the inherent imprecision of non-economic monetary awards. However, that is largely a matter of degree. In fire insurance claims, for example, there are inevitable differences about the value of lost property, or whether repair costs were "reasonable". Law reports are filled with cases in

which PIP insurers challenge the cause of the insured's injuries, or the necessity of certain medical care, or the reasonableness of the charges. There is no principled reason why an insurer's ability to come up with excuses for delaying payment - - real or imaginary - - makes UIM insurance unlike other forms of voluntary insurance. More importantly, perhaps, the Legislature saw no reason to draw any such distinction. Instead, the UTPA unequivocally provides that if the insurer delays paying a properly supported claim by its insured, and it turns out that the claim was valid, it is liable for UTPA interest on the unpaid amount.

There are solid policy reasons for this. Without UTPA interest, there is no meaningful remedy at all for policy-holders whose claims are denied or delayed. Nor is there any reason for insurers to disgorge the benefits they contracted to provide. It was reasonable and responsible for the Legislature to regulate the claims practices of Michigan insurers through the UTPA. Sadly, the decisions below, which reward Defendant for keeping the benefits owed the Nickolas for more than a decade, undermine the UTPA and the policies behind it.

The decision of the Court of Appeals is fundamentally at odds with Griswold Properties and No-Limit Clothing. The home-brewed "reasonably in dispute" addition to the first sentence of MCL 500.2006(4) cannot be reconciled with the language or reasoning of either Griswold Properties or No-Limit Clothing.

As the preceding discussion reflects, the issue presented is of major significance to the State's jurisprudence. In a broad sense, it implicates the separation of powers required by Michigan's fundamental law, its Constitution. And, the case involves the

regulation of insurance practices which, if unchecked, create mischief for the insured Michigan public. Minimally, the case involves an important question of statutory construction with significant implications for the insurer-insured relationship.

F. If "Reasonably In Dispute" Applied To Claims Of The Insured, Leave Should Be Granted To Determine Its Meaning

Neither the trial judge nor the Court of Appeals entertained an evidentiary hearing or other procedure to determine whether, if "reasonably in dispute" was an interest defense, the Nickolas' claim was in fact reasonably disputed. The Courts seemingly relied more on the inherent imprecision of non-economic damages instead of the specific facts of this case. The method for determining "reasonably in dispute" would warrant consideration if that were an excuse from interest obligations.

The questionable nature of the decision below is particularly noteworthy in this case. For more than one year after the crash, Defendant hadn't even bothered to look at its own insurance policy to see whether it allowed Plaintiffs to demand arbitration. On what basis can one say that the insurer even looked at the medical records, much less made a reasoned decision to dispute UIM liability?

Even if MIC General could avoid interest liability to its own insured when the UIM claim was "reasonably in dispute", the trial court erred in making that finding. Ignoring for now the different language in the first two sentences of MCL 500.2006(4), contrary to Griswold Properties, there is no evidence to support a "reasonably in dispute" finding.

In the absence of any supporting testimony, the trial court erred in finding, as fact, "reasonably in dispute". This Court could reverse on that basis as well, either finding no "reasonably in dispute" or remanding for an evidentiary hearing on that point. See Dept of Transportation v Initial Transport, Inc, Ct. of App # 291010, rel'd 6/24/10 (Ex. 23); Langley v Auto-Owners, Ct. of App # 300517, rel'd 6/28/12 (Ex. 24).

Here MIC refused to acknowledge its duty to arbitrate (Ex. 21, pp. 7, 17, 18), even when it filed its Answer in May of 2005, a full year after the initial claim (Ex. 6, Ex. 14). In view of the clear language of its own insurance policy (Ex. 5), it cannot be said that MIC General "reasonably" refused to arbitrate.

In its Response, p. 9, Defendant argued that it was "reasonably in dispute" "whether the alleged injuries pierced the [No-fault "serious impairment"] threshold." Progressive, Smith's insurer, had no difficulty recognizing "serious impairment", as it promptly paid the full policy limits to both Plaintiffs. The arbitrators likewise realized, by their Award, that the injuries crossed the No-fault threshold. MIC General offered neither evidence, nor a coherent explanation, why it thought Plaintiffs' injuries fell short of "serious impairment".

Defendant cannot claim that it was ignorant of the medical information needed to verify the injuries. Plaintiffs' counsel provided Defendant with complete access to their medical records, which MIC General already had in its files as payor of Plaintiffs' first party medical expenses (Ex. 6, Ex. 7, Ex. 8).

What were the reported injuries? A broken fibula (George) and knee cap (Thelma), head injuries (George), severely sprained ankles (George) and wrist (George),

multiple other injuries and bruises (both) (Ex. 7). These required hospitalization for over three weeks (George), as well as attendant care services (both), leaving them incapable of independent living (Ex. 7). These constitute "serious impairment", and Defendant cannot even plausibly argue otherwise. See People v Anderson, Ct. of App # 277370, rel'd 11/18/08 (Ex. 25) ("a 'serious bone fracture' qualifies as a serious impairment of a bodily function"); Kern v Blethen-Coluni, 240 Mich App 333; 612 NW 2d 838 (2000); McCormick v Carrier, 487 Mich 180; 795 NW 2d 517 (2010) (fractured ankle).

Defendant has also cited the fact that damages had not been quantified, and may have been $20,000 or less (Ex. 11). The very nature of the injuries makes it clear that the recoverable damages exceed $20,000; a fact readily acknowledged by Progressive and the arbitrators.

This thesis by Defendant, if accepted, would virtually nullify MCL 500.2006, as an insurer can always question damages, even the reasonableness of medical bills. If this fact alone provided the insurer with UTPA interest immunity, there could never be a UTPA recovery. In spite of this, the Legislature made 12% interest available (albeit with a "reasonably in dispute" hurdle inapplicable to claims by the insured) even to third party tort claimants with unliquidated claims. This policy judgment by the Legislature puts to rest the notion that an unliquidated claim is, for that reason, "reasonably in dispute".

When all is said and done, the Court of Appeals and trial court erred in refusing to apply 12% interest per MCL 500.2006(4) on the ground that Plaintiffs' UIM claims were "reasonably in dispute". This Court should grant leave and reverse.

G. The Claims Were No Longer "Reasonably In Dispute" Once The Arbitrators Quantified The UIM Recovery

The insurer never took issue with, or challenged, the arbitrators' award. By then, October of 2013, no vestige of excuse could be mustered for the insurer keeping the UIM benefits. Still, it continued to resist entry of a judgment, presumably hoping to avoid even the modest level of interest available under MCL 600.6013 (see Ex. 1, pp. 8-10). By this ploy, it still, more than two years later, has not paid the Award.[2] The fact that the Court of Appeals did not even allow UTPA interest for delay after the arbitration award underscores its erroneous treatment of the case. The result and analysis should be reviewed by this Court.

II. LEAVE TO APPEAL SHOULD BE GRANTED TO REVIEW THE LOWER COURTS' RULING THAT THE INSURER'S ANSWER, REFUSING TO ADMIT THAT ITS INSURANCE POLICY ALLOWED PLAINTIFFS TO REQUEST ARBITRATION, WAS NOT SANCTIONABLE UNDER MCR 2.114

By their Complaint, Plaintiffs alleged that they were entitled to arbitrate the UIM dispute. Plaintiffs were unmistakably correct, as the UIM "ARBITRATION" provision clearly provides for arbitration upon request of either party, but Defendant consistently

[2] In the Court of Appeals, Defendant placed great stock in its assertion - - with no objective support - - that it would, or did, tender payment, presumably without either statutory interest or UTPA interest from the date of the arbitration award. Gamesmanship of this nature does not change the fact that the insurer has kept the amounts awarded by the arbitrators even after issuance of the Arbitration Award.

denied this, refusing in its Answer to acknowledge the obvious, instead coyly failing to admit or deny on the basis that it didn't know what its own insurance policy said.

Initially, the trial court seemingly was receptive to Plaintiffs' Rule 2.114 motion, but unaccountably did not decide whether the Insurer's conduct was sanctionable. Instead, he ordered production of cost and fee information, the prelude to an award. He failed to decide the issue when initially submitted, reserving the decision for after completion of the arbitration process. As a starting point, the courts below erred in refusing to even decide the issue of law presented.

Even more perplexing is his denial of fees following arbitration. The trial court's "should have been heard by the arbitrator" explanation is nonsensical. The attorney fees in issue had been incurred in circuit court proceedings, before arbitration even began. The initial Order (Ex. 2), following the Court's comments at the motion hearing, reserved the issue for later judicial determination. Heedful of this, the arbitrators declined to usurp the Court's role in deciding judicial issues of statutory interest or Court Rule sanctions, as the arbitrators understood that they would later be decided by the Court. To the extent that they considered it, the arbitrators' decision was that these were for the Court ("not inclusive of other interest, fees or costs that may otherwise be allowable by the Court"). With the reservation of authority to decide Rule 2.114 attorney fee sanctions, respected by the arbitrators, the Court had no reason to abdicate the judicial responsibility to decide the Rule 2.114 question, arising in circuit court proceedings.

MCR 2.114(D) identifies the obligations imposed on litigants whose attorneys sign a Complaint or Answer:

> "The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Subsections (2) and (3) provide separate grounds for sanctions. If a pleading is not well-grounded in fact and law [*i.e.*, violative of subsection (2)], it is sanctionable, regardless of whether it is also violative of the "improper purpose" criterion of subsection (3). Briarwood v Faber's Fabrics, 163 Mich App 784, 793; 415 NW 2d 310 (1987); Lloyd v Avadenka, 158 Mich App 623, 626-627; 405 NW 2d 141 (1987).

Parsing this language, Rule 2.114(D) imposes several distinct obligations on a litigant and his or her counsel. Sub-rule (D)(2) first imposes the duty to investigate before filing; "reasonable inquiry" is required. The Rule imposes an affirmative duty of pre-filing investigation of the law and facts. DeWold v Isola, 180 Mich App 129, 136; 446 NW 2d 420 (1989); Davids v Davis, 179 Mich App 72, 89; 445 NW 2d 460 (1989); Briarwood v Faber's Fabrics, 163 Mich App 784, 794; 415 NW 2d 310 (1987). A

signature verifies "after reasonable inquiry" that the pleading is both factually and legally meritorious. One may not file an Answer without verifying the facts or assertions.

Sub-Rule (D)(3) recognizes that litigation may sometimes be instituted or defended for purposes such as spitefulness or to delay the outcome of a case. That sub-Rule imposes a different obligation. Signators vouch that, "the document is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Rule 2.114 has two self-evident purposes. First, it recognizes that public resources are diverted, and that meritorious suitors are delayed in their quest for justice, when judges must spend their time on frivolous suits or defenses. Thus, the prospect of sanctions has a deterrent purpose, hopefully discouraging litigants and lawyers from filings which have no legitimate basis. BJ's Construction v VanSickle, 266 Mich App 400, 405-406; 700 NW 2d 432 (2005).

The Rule also has a compensatory feature. Unjustified defendant resistance to righteous claims requires the plaintiff and counsel to incur legal expenses and to expend time. While this is a necessary by-product of all cases, it is unjustified when the Answer never should have been filed in the first place. In this regard, Rule 2.114 compensates, in part, those who have been required to incur legal fees due to baseless defenses.

There is no discretion to a trial court's decisional obligation when a violation of subsection (D) exists. Subsection (E) states:

> "If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both,

> an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages" (emphasis added).

As a matter of construction, the term "shall", in contrast to a discretionary term like "may", reflects the drafters' intent to impose a mandatory requirement. People v Grant, 445 Mich 535, 542; 520 NW 2d 123 (1994); Browder v International Fidelity Ins Co, 413 Mich 603, 612; 321 NW 2d 668 (1982); Kowalski v Fiutowski, 247 Mich App 156, 160-161; 635 NW 2d 502 (2001).

Consistent with this principle, the Courts have recognized the mandatory nature of the term "shall impose" in Rule 2.114(E). Where a violation of Rule 2.114(D) exists, the trial court is required to impose sanctions; there is no discretion to ignore the violation. In re Goehring, 184 Mich App 360, 367; 457 NW 2d 375 (1990); Contel Systems v Gores, 183 Mich App 706, 709-710; 455 NW 2d 398 (1990).

The first prerequisite of Rule 2.114(D)(2) is to tell the truth. Sanctions are in order when the pleading is not "well grounded in fact", when the allegations of fact are not true. Bechtold v Morris, 443 Mich 105, 107; 503 NW 2d 654 (1993); Jackson County Hog Producers v Consumers Power, 234 Mich App 72, 88-89; 592 NW 2d 112 (1999); McDonald v Election Commission, 255 Mich App 674, 701-702; 662 NW 2d 804 (2003); Michigan Bank v Reynaert, Inc, 165 Mich App 630, 645; 419 NW 2d 439 (1988); BJ's Construction v Van Sickles, 266 Mich App 400, 407-408; 700 NW 2d 432 (2005).

Here, the plain language of Defendant's own insurance policy requires arbitration upon election of either party. The claim was made almost a full year before suit was filed. The insurer certainly knew what its own insurance policy said. If it lied to its attorney, or withheld the insurance policy from him, this is scarcely a defense. Nor was there any reason for defense counsel not to obtain and look at the insurance policy in light of the "reasonable inquiry" requirement. The obvious purpose of the denial - - confirmed by the later course of conduct - - was to delay payment of the benefits owed to Mr. and Mrs. Nickola.

In refusing relief, the trial judge did so only on the basis that it was for the arbitrators, a rationale discussed above. The Court of Appeals came up with an entirely different basis, not adopted by the trial judge. The appellate court concluded that Plaintiffs "repeatedly failed to comply" with the March 6, 2006 Order (Ex. 2), and therefore Plaintiffs had "waived" their earlier express request by failing to submit an itemization of costs and attorney fees (Ex. 1, p. 4).

Factually, there was no "repeat[ed] fail[ure] to comply". A single order (Ex. 2) sought a listing of attorney time. There was no "repeated" order, or even a hint or suggestion that the court expected a filing like that independent of a hearing or decision on Rule 2.114 compliance. The trial court himself perceived no "waiver". Indeed, that word is a misnomer, or at least a transparent legal fiction; Plaintiffs expressly sought Rule 2.114 relief both before and after arbitration.

The "waiver" analysis places the cart before the horse. Plaintiffs called upon the trial judge to decide the legal issue of whether Rule 2.114 sanctions were in order. The

supposed act of "waiver" had not then occurred. There was nothing impermissible about Plaintiffs waiting for a decision that sanctions were recoverable before providing final quantification of the amount. Especially so since the Order of March 6, 2006 set no time for submitting a detailed outline of the time and costs for which compensation was sought. Indeed, that Order contemplated final judicial decisions after conclusion of the arbitration. Until that time, it was impossible for Plaintiff to predict the total attorney time and costs spent on the case.

Once the arbitration was completed, Plaintiffs promptly resubmitted the sanctions claim, seeking a hearing. Under the practice required by Smith v Khouri, 481 Mich 519, 528-529; 751 NW 2d 472 (2008) and Augustine v Allstate, 292 Mich App 408, 419; 807 NW 2d 77 (2011), the next step would be an evidentiary hearing, and at that time the Court would receive the evidence and decide the amount of an appropriate award. In essence, the Court of Appeals faulted Plaintiffs for requesting an attorney fee proceeding before producing the evidence that the request, if granted, would later engender.

The ultimate impact of the lower court decisions is to allow insurance companies to misrepresent the content of their own insurance policies, then reap the financial benefit of delay in paying contracted amounts due the insured. This Court should grant leave and hold that MCR 2.114 and MCL 500.2006(4) do not endorse this.

RELIEF SOUGHT

WHEREFORE, Plaintiffs-Appellants pray that this Honorable Court grant their Application for Leave to Appeal.

Respectfully submitted,

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